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Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–376 OF 2003

ZALEHA ZAHARI, KN SEGARA AND SULAIMAN DAUD JJCA

24 APRIL 2008

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Contract — Breach — Confidentiality agreement — System devised by appellant for assembly of loaders — Whether information on system confidential in nature — Whether system was unique in light of usage and practice of similar trade and industry — Whether there was breach of confidential information

D

Contract — Collateral contract — Extrinsic evidence rule — Whether collateral contract must be viewed strictly — Whether collateral contract existed — Oral representation — Proof — Evidence Act 1950 s 92(b)

E

Contract — Terms — Implied terms — Relationship between parties — Whether created mplied obligation of good faith and honesty and duty to act reasonably — Whether court will impose implied terms where terms of contract are clear and free from ambiguity — Whether fiduciary relationships existed between parties — Whether mere contractual principal relationship

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The principal business of the first respondent included the production of loaders, which formed integral components of compact disc based equipment. The second respondent had shareholding in the first respondent company. In late 1992, the second respondent appointed the appellant as its subcontractor to assemble the loaders. Prior to 10 January 1996, there was no written relationship between the parties. On 10 January 1996, the appellant and the first respondent executed a 'subcontractor contract' to formalise their relationship. Eventually, on 14 February 1998, the first respondent served on the appellant a six months notice under Article X1 of the contract of its intention to terminate the same. The appellant filed a claim in the High Court seeking damages and other declaratory relief for breach of contract arising out of the said termination and for wrongful appropriation and use by the respondents of confidential information belonging to the appellant. The High Court dismissed the appellant's claim with costs. The appellant appealed to the Court of Appeal. The issues that arose for determination were: (1) whether there existed an implied term of the contract or a collateral

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agreement as to a minimum of 50,000 loaders to be assembled per day for the duration of the contract; (2) whether the contract was validly terminated; and (3) whether the appellant had any proprietary or other right to the system of assembly, and if so, whether the respondents had appropriated that right wrongfully.

Held, dismissing the appeal with costs:

(1) The doctrine of collateral contract or agreement is recognised by virtue of proviso (b) to s 92 of the Evidence Act 1950 which allowed to be admitted in evidence any separate oral agreement as to any matter on which a document was silent and which was not inconsistent with its terms. Unless the additional evidence sought to be introduced fell within the scope of any of the provisos, it should not be allowed to be introduced as it would be to contradict, vary, add or subtract from the terms of the agreement. Such collateral contract must be viewed strictly. Thus, based on the facts, the learned judge had rightly considered all the relevant factors in coming to his finding on the non-existence of the alleged oral representation or collateral agreement (see paras 11 & 16).

(2) The essence of a fiduciary relationship is one of trust and confidence between the fiduciary and the beneficiary where the latter undertook or agreed to act for, on behalf or in the interest of, the beneficiary, being a person in a position of vulnerability. On the facts, there was no element of trust and confidence in the relationship between the parties, and no party was put in a position of vulnerability under the contract. It was true that there was a close relationship between the parties in the carrying out of their respective functions and obligations under the contract but it was not such giving rise to a fiduciary relationship. Their close relationship could be attributed to the nature of the contract and their respective obligations thereunder. It was a mere principal-contractor relationship (see paras 26–27).

(3) The existence of an implied obligation of good faith and honesty and duty to act reasonably would depend on the expressed intention of the parties which was to be ascertained from the terms of the contract, and on the nature of the relationship between the parties. It is a well established principle that where the terms of a contract are clear and free from ambiguity the court will not impose any implied terms. In the circumstances, the contract was validly terminated in accordance with the clear terms thereof. Further, the internal problems experienced by the appellant constituted reasonable grounds for the respondents to terminate the contract by giving the requisite six months notice. The

appellant had in fact acquiesced in the termination when it asked the respondents to leave its premises before the expiry of the said six months period (see paras 28–31).

(4) The information on the system of assembly was not confidential in nature. The system of assembly was opened to the respondents' representatives with the consent of the appellant. It was also clear from the contract that the manufacturing process was regulated and monitored by the respondents to ensure quality control set by them. Under the contract, the respondents were also given access to the appellant's factory to provide training opportunities for the appellant's personnel. Thus, the appellant also failed to show that the system of assembly was unique when judged in the light of usage and practice of similar trade and industry. The evidence clearly showed that the key features of the system had been used in the assembly industry long before the setting up of the appellant's assembly plant (see paras 36–37).

[Bahasa Malaysia summary

Perniagaan utama responden pertama termasuk pengeluaran pemuat yang membentuk komponen utama peralatan berasaskan cakera padat. Responden kedua memiliki pegangan saham di dalam syarikat responden pertama. Pada akhir 1992, responden kedua telah melantik perayu sebagai subkontraktornya untuk memasang pemuat tersebut. Sebelum 10 Januari 1996, tidak terdapat hubungan yang bertulis di antara pihak-pihak. Pada Januari 1996, perayu dan responden pertama telah melaksanakan satu 'kontrak subkontraktor' untuk memformalkan hubungan mereka. Akhirnya, pada 14 Februari 1998, responden pertama telah menyerahkan kepada perayu enam bulan notis di bawah Article X1 kontrak tersebut mengenai niatnya untuk menamatkan kontrak tersebut. Perayu telah memfailkan tuntutan di Mahkamah Tinggi memohon ganti rugi dan relief deklarasi yang lain bagi kemungkiran kontrak yang timbul daripada penamatan tersebut dan untuk salah pengambilan dan penggunaan maklumat sulit milik perayu oleh responden. Mahkamah Tinggi telah menolak tuntutan perayu dengan kos. Perayu telah merayu ke Mahkamah Rayuan. Isu-isu yang ditimbulkan untuk dipertimbangkan adalah: (1) sama ada wujud terma tersirat dalam kontrak tersebut atau perjanjian sampingan terhadap inimum 50,000 pemuat yang perlu dipasang dalam sehari bagi tempoh kontrak; (2) sama ada kontrak secara sah telah ditamatkan; dan (3) sama ada perayu memiliki apa-apa kepunyaan atau hak yang lain kepada sistem pemasangan, dan jika benar, sama ada responden-responden telah mengambil hak tersebut secara salah.

Diputuskan, menolak rayuan dengan kos:

(1) Doktrin kontrak kolateral atau perjanjian adalah diiktiraf oleh

peruntukan (b) kepada s 92 Akta Keterangan 1950 yang membenarkan penerimaan sebagai keterangan mana-mana perjanjian lisan yang berasingan berkenaan dengan apa jua perkara yang tidak dinyatakan oleh dokumen dan yang tidak selaras dengan terma-termanya. Melainkan keterangan tambahan yang hendak dikemukakan termasuk di dalam skop mana-mana peruntukan, ia tidak seharusnya dibenarkan untuk dikemukakan yang mana ianya akan menjadi bertentangan, pengubahan, penambahan atau pengurangan daripada terma-terma perjanjian. Kontrak kolateral tersebut mestilah secara tegasnya diteliti. Oleh itu, berdasarkan fakta, hakim bicara telah mempertimbangkan secara wajar kesemua faktor yang relevan dalam membuat penemuan berkenaan dengan ketidakwujudan representasi lisan seperti yang didakwa atau perjanjian sampingan (lihat perenggan 11 & 16).

(2) Inti pati sesebuah hubungan fidusiari adalah amanah dan keyakinan di antara fidusiari dan benefisiari di mana kemudiannya berjanji dan bersetuju untuk bertindak bagi pihak atau dalam kepentingan benefisiari yang menjadi pihak di dalam keadaan yang kerentanan. Berdasarkan fakta, tidak terdapat elemen kepercayaan dan keyakinan dalam hubungan di antara pihak-pihak, dan tidak ada pihak yang diletakkan dalam keadaan kerentanan di bawah kontrak tersebut. Adalah benar bahawa terdapat hubungan yang rapat di antara pihak-pihak dalam menjalankan fungsi dan kewajipan masing-masing di bawah kontrak tetapi ianya tidak menimbulkan hubungan fidusiari. Hubungan rapat mereka boleh dianggap sebagai bersifat kontraktual dan kewajipan masing-masing di dalamnya. Ianya hanyalah hubungan prinsipal dan kontraktor semata-mata (lihat perenggan 26–27).

(3) Kewujudan kewajipan tersirat yang suci hati dan ikhlas dan tanggungjawab untuk bertindak wajar adalah tertakluk kepada niat yang jelas pihak-pihak yang mana perlu dipastikan daripada terma-terma kontrak, dan atas sifat hubungan di antara pihak-pihak. Ianya adalah prinsip yang kukuh bahawa di mana terma-terma kontrak yang jelas dan bebas daripada kesamaran, mahkamah tidak akan mengenakan terma-terma tersirat. Dalam keadaan tersebut, kontrak telah secara sahnya ditamatkan berdasarkan kepada terma-terma yang jelas di dalamnya. Selanjutnya, permasalahan dalaman yang dialami oleh perayu membentuk alasan yang munasabah bagi responden menamatkan kontrak dengan memberikan notis enam bulan seperti yang disyaratkan. Perayu yang sebenarnya setuju dengan penamatan apabila meminta responden meninggalkan premisnya sebelum berakhirnya tempoh enam bulan tersebut (lihat perenggan 28–31).

(4) Maklumat berkenaan dengan sistem pemasangan adalah tidak bersifat sulit. Sistem pemasangan adalah terbuka kepada wakil-wakil responden dengan kebenaran perayu. Adalah jelas daripada kontrak bahawa proses

pembuatan adalah dikawal selia oleh responden untuk memastikan kawalan kualiti yang ditetapkan oleh mereka. Di bawah kontrak, responden diberikan laluan kepada kilang perayu untuk menyediakan peluang latihan kepada kakitangan perayu. Oleh itu, perayu juga gagal untuk menunjukkan bahawa sistem pemasangan adalah unik apabila dinilai daripada penggunaan dan amalan perdagangan dan industri yang sama. Keterangan jelas menunjukkan bahawa ciri penting sistem tersebut telah digunakan dalam industri pemasangan lebih lama sebelum perayu mendirikan loji pemasangannya (lihat perenggan 36–37).]

Notes

For a case on breach of confidentiality agreement, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2573.

For cases on extrinsic evidence rule, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2987–2988.

For cases on implied terms, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5305–5355.

Cases referred to

Chow Yee Wah & Anor v Choo Ah Pat [1978] 2 MLJ 4 (refd)

Coco v AN Clark (Engineers) Ltd [1969] RPC 41 (refd)

Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35 (refd)

Frame v Smith (1987) 42 DLR [4th] 81 (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1 (refd)

Heilbut, Symons & Co v Buckleton [1913] AC 30 (refd)

Hospital Products Ltd v United States Surgical Corp (1984) 156 CLR 41 (refd)

Kluang Wood Products v Hong Leong Finance [1999] 1 MLJ 193 (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97 (refd)

Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229 (refd)

Watt v Thomas [1947] AC 484 (refd)

Legislation referred to

Evidence Act 1950 s 92, 92(b)

Appeal from: Suit No S2–22–319 of 1999 (High Court, Kuala Lumpur)

Malik Imtiaz Sarwar (Bastian Vendargon with him) (Reuben Annou & Co) for the appellant.

Cyrus Das (K Mohan with him) (Shook Lin & Bok) for the respondent.

Sulaiman Daud JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the learned judge of the High Court dismissing the appellant's claim against the respondents for damages and other declaratory reliefs arising out of an alleged repudiation of a written agreement and an alleged wrongful appropriation and use of confidential information.

BACKGROUND FACTS

[2] The factual background can be stated briefly. The second respondent is a company limited by shares with shareholding in the first respondent's company. The principal business of the company includes the production of loaders which forms integral components of compact disc based equipments. In 1991 the second respondent subcontracted the assembly of the loaders to a company called Singamip Industries Sdn Bhd ('Singamip') which had its operation in Tampoi. At the same time it appointed one of its officers by the name of Allan Netto ('SP2') to supervise the assembly at the plant. Subsequently in late 1992 the second respondent appointed the appellant to replace Singamip as its subcontractor to carry out the assembly of the loaders. After the phasing out of Singamip and until 1995, the appellant was the only subcontractor carrying out such assembly for the respondents in this region.

[3] In 1993 the appellant commenced operation at its assembly plant known as Seven Seas 1 ('SS1') in Desa Cemerlang, Johore which later expanded to Seven Seas 2 ('SS2') in Senai. Prior to 10 January 1996 there was no written relationship between the parties. Their relationship only evolved out of constant and continuous dealing between them. The volume of loaders required to be assembled was determined at logistic meetings. So too, issues pertaining to charges for down time and under capacity. Ultimately on 10 January 1996 the appellant and the first respondent executed a 'subcontractor contract' ('the contract') to formalise their relationship. The annexure to the contract which formed an integral part thereof was executed later on 15 August 1996. In April 1996 the appellant established its third assembly plant known as Seven Seas 3 ('SS3') replacing SS1 and SS2.

[4] Eventually on 14 February 1998, the first respondent served on the appellant the requisite six months notice under Article X1 of the contract of its intention to terminate the same. The appellant did not challenge the termination but however stopped operation before the expiry of the six months period, and at the same time asked the respondents to vacate its premises in SS3.

[5] From the pleading it is apparent that the appellant's causes of action against the respondents in the present suit are for breach of contract arising out of the said termination, and for wrongful appropriation and use by the latter of confidential information belonging to the appellant. The issues that arose for determination in the court below which are now pursued in this appeal are as follows:

(i) Whether there exist an implied term of the contract, or a collateral agreement, as to a minimum of 50,000 loaders to be assembled per day for the duration of the contract?

(ii) Whether the contract was validly terminated?

(iii) Whether the appellant has any proprietary or other right to the system of assembly, and if so, whether the respondents have appropriated that right wrongfully?

[6] The learned judge found for the respondents in respect of all the aforesaid issues. The present appeal substantially relates to the findings of fact by the learned judge. The function of an appellate court in hearing an appeal on questions of fact is well established. In *Watt v Thomas* [1947] AC 484, Lord Thinkerton, in a well known passage of his speech summarises the principles to be adopted as follows: '(i) where a question of fact has been tried by a judge without a jury, and there is no misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; (ii) the appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; and (iii) the appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court'.

[7] In *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, the Federal Court affirmed the test of 'insufficient judicial appreciation of evidence' as a ground for appellate intervention adopted by the Court of Appeal in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97. In holding that such a test is consistent with the established 'plainly wrong test', Steve Shim CJ (Sabah & Sarawak) said, at p 10, as follows:

In our view, the Court of Appeal in citing these cases had clearly borne in mind the central features of appellate intervention is to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In doing so the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, ie that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal …

[8] With this guiding principle in mind we will now proceed to consider whether there was an insufficient judicial appreciation of evidence by the learned trial judge in coming to his finding in respect of the three identified issues aforesaid.

REPRESENTATION AS TO THE VOLUMES OF 50,000 UNITS A DAY/EXCLUSIVITY

[9] The claim that there was a representation as to the said volumes was set out in para 16.2 of the statement of claim which read as follows:

16.2 It had been represented by the second defendant that at all material times during the said operation of the said agreement, the volume of loaders required by the first and/or second defendants was between 50,000 and not exceeding 70,000 units per day and this volume was to be exclusively manufactured by the plaintiff. This representation was an intrinsic element, either expressed or implied, of the agreement and/or any collateral agreement thereto. As a result of the said representation, the plaintiff agreed to the reduction of the unit price from $0.83 to RM1.48 as fixed by the second defendant giving a reasonably and legitimately income of RM74,000 per day to the plaintiff.

[10] Learned counsel for the appellant submitted that the said oral representation on the volume of loaders formed an essential element in the relationship between the parties on the basis that the written contract document was not intended to form the entire agreement between the parties. In other words such representation amounted to an express term of the contract so as to constitute a collateral agreement between them.

[11] The doctrine of collateral contract or agreement is recognised in this country by virtue of proviso (b) to s 92 of the Evidence Act 1950 which allowed to be admitted in evidence any separate oral agreement as to any

matter on which a document is silent and which is not inconsistent with its terms. Unless the additional evidence sought to be introduced falls within the scope of any of the provisos, it should not be allowed to be introduced as it would be to contradict, vary, add or subtract from the terms of the agreement (per Chang Min Tat FJ in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 at p 233). Such collateral contract must be viewed strictly (see *Heilbut, Symons & Co v Buckleton* [1913] AC 30). No agreement would be safe from being re-written by one party in court of law if parole evidence which do not fall within the proviso of s 92 of the Evidence Act is admitted in evidence (see *Tindok Besar Estate Sdn Bhd*).

[12] The question, then, whether there is such a representation made on the minimum requirement of 50,000 units of loaders per day to be exclusively manufactured by the appellant as pleaded. The learned trial judge answered in the negative, where in that part of his judgment he said:

> It is my opinion that for the oral evidence to be accepted the credibility of the witness has to be solid. Unfortunately the evidence given are either self serving or because of disappointment with Philips. I treat the evidence given by Jos Sanders (SP1) or Allan Netto on the 'promises' of the volume with suspect.

[13] Learned counsel for the appellant criticised the learned judge's finding on two main grounds. His first argument was directed to the learned judge's finding on the credibility of SP1 and SP2, the appellant's witnesses. It is submitted that the learned judge had no basis to conclude that the relevant witnesses as not credible. It is further submitted that the learned judge misapplied the test in *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 in that he failed to take into consideration the objective facts concerning the nature of the relationship between the parties and placed too much weight on the purported motives of SP1 and SP2. His second argument is related to the learned judge's evaluation of the circumstantial evidence as to the relationship between the parties, the element of exclusivity and the establishment of SS3.

[14] We will firstly deal with the issue of credibility. It is trite law that where the question before the appellate court relates to the credibility of witnesses, the court has always been reluctant to differ from the judge who has seen and heard the witnesses, unless it can be clearly shown that he has fallen in error. It would not be sufficient to warrant any interference merely because the appellate court entertains doubt whether such finding is right (see *Kluang Wood Products v Hong Leong Finance* [1999] 1 MLJ 193). The appellate court is also reluctant to interfere in a case where the learned judge

has announced as part of his judgment that he believes one set of witnesses and disbelieves the others (see *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 4).

[15] From the judgment it appears to us that the learned judge has rejected the evidence of SP1 and SP2 on three main grounds. First of all he found that SP2 and SP3 have given conflicting evidence as to how the two shareholders of the appellant first met SP1 to start Seven Seas. He also found SP2 to have wavered and faltered under cross-examination on the setting up of Seven Seas by making specific reference to that part of SP2's testimony on cross-examination. Secondly, SP2, while in the employment of Philips, had negotiated with SP1 in the setting up of Seven Seas, and as such the learned judge found his evidence to be self serving for his own benefit and that of SP3, his brother. Thirdly the learned judge formed the opinion that SP1 had an axe to grind for two reasons, ie (i) he was not given a free hand to be the man in Philips; and (ii) his association with Allan Netto was not well received in Philips. Having considered the judgment as a whole we are satisfied that the learned judge has not erred in his finding on the credibility of SP1 and SP2 to warrant any interference by this court.

[16] Apart from the issue of credibility, we are also satisfied that the learned judge has rightly considered all the relevant factors in coming to his finding on the non-existence of the alleged oral representation or collateral agreement. He has considered the event and the background leading to, and the purpose for, the establishment of SS3. He also took into account the fact that the appellant has all the expertise at hand in the drafting of the agreement to reflect the true intention of the parties.

[17] The learned judge also referred to Article IV.5 of the contract which deals with the requirement of loaders. He found nothing therein which guarantee the volume or quantity of loaders to be assembled by the appellant per day. The said article reads as follows:

> Each month Philips will provide call-off requirement. In the first month the volume will be fixed and in the second and third months a fluctuation within +/-10% will be allowed. Additionally, Philips will provide a non-binding forecasted call-off requirement for the subsequent three months;
>
> Philips will be legally bound by this three months call of requirement;
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> Philips will not be liable for any firm quantities above this three months call-off requirement. This would mean the quantities could fluctuate to zero while the agreement can remain effective;
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> This call-off requirements will be supplied by Philips to Seven Seas each second week of the month according to the Philips production calendar.

A **[18]** Learned counsel for the appellant argued that the said article is not intended to define volume but a provision setting out a 'call off' procedure for the purpose of optimising resources. With respect we do not agree with him. Even if the said clause is not intended to define volume but it is very much related to the volume of loaders required to be assembled per day. It B sets out the formula in determining such volume. If it is the intention of the parties to provide for the minimum requirement of loaders to be assembled per day we find no reason for the same to be omitted in the contract. As mentioned earlier, the appellant has all the expertise, legal and technical, in the drafting of the contract. Further we are of the view that the alleged oral C terms on the minimum volume of loaders is also in disharmony, if not in contradiction, with the express terms of the said article which specifically provide 'for the quantities could fluctuate to zero'.

D **[19]** It is to be noted that the contract also provide for under capacity claim for the purpose of compensating the appellant for the excess labour if the volume required is less than the order. From the evidence and other contemporaneous documents relating to this matter, it is apparent that all such claims by the appellant were based on orders and the call off E requirement made at the logistic meetings. No claim was ever made on the alleged promise of 50,000 loaders per day. The basis on which the under capacity claim was made is in our view consistent with the procedure set out in the said Article IV.5 as to the daily requirement of loaders by the respondents. This further fortified our view that the parties never intended to F specify the minimum amount of loaders required per day in the contract.

[20] With regard to the claim of exclusivity, we failed to see how such an assurance is relevant to the claim on the alleged implied terms as to the minimum requirement of loaders per day. It is clear from the words of the G contract that the requirement of loaders by the respondents is not constant but subject to 'a non-binding forecasted call off requirement' which could fluctuate to zero. Further it is to be recalled that the under capacity claim made by the appellant was never based on these figures. In any event we are in agreement with learned counsel for the respondents that the objective H evidence is also inconsistent with any exclusive arrangement. First, there is the minute of Seven Seas Industries management meeting held on 15 May 1996 where it is clearly recorded that 'Seven Seas is currently investigating and having preliminary discussions with other customers concerning manufacturing of other products and possible joint ventures'. Then there is I the evidence of SP5 who confirmed that the second respondent not only requested one floor to be reserved for them but also agreed for other customers to use the appellant's factory. Further it is to be noted that the appellant did not complain of any breach of its alleged exclusive right when the respondents' own factory commenced operation in 1996 for the assembly

of their own loaders. For the reasons aforesaid we agree with the finding of the learned judge that the appellant has failed to show the existence of such oral representation or collateral agreement, or the element of exclusivity as pleaded.

[21] We will next deal with the validity of the termination.

TERMINATION OF CONTRACT, WHETHER VALID

[22] The learned judge held that the contract was validly terminated pursuant to Article X1 by giving six months prior notice as required therein. He also rejected the appellant's contention on the existence of a fiduciary relationship between the parties to disentitle the respondents from terminating the contract pursuant to the said article. Learned counsel for the appellant raised two main issues which he contended to be relevant to the issue of termination. First, whether there exist a fiduciary relationship between the parties; and secondly, if such relationship existed, whether there is implied in the contract an obligation of good faith between the parties to render the termination clause ineffective.

[23] We will first deal with the issue of fiduciary relationship. The guideline in determining the existence of a fiduciary relationship was laid down by Wilson J in *Frame v Smith* (1987) 42 DLR [4th] 81, where Her Ladyship said at p 99:

> Relationship in which a fiduciary obligation have been imposed seem to possess three general characteristics:
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> (1) the fiduciary has scope for the exercise of some discretion or power;
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> (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal interest;
>
> (3) the beneficiary is peculiarly vulnerable to, or at the mercy of, the fiduciary holding the discretion or power.

[24] In *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, Mason J classified the critical feature of these fiduciary relationship as being that 'the fiduciary undertakes or agrees to act for on behalf of or in the interest of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical way'.

[25] Before us, learned counsel for the appellant submitted that the relationship between the parties went beyond that of a mere contractor-principal relationship. It is one of trust and confidence, in the

A nature of partnership. It is asserted that the respondents have full access to the financial information of the appellant and participated in making structural changes at SS1 and SS2 and in the setting up of SS3. It is also submitted the existence of the fiduciary relationship is evidenced in the unequal bargaining position between the parties.

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[26] Having examined the evidence on the nature and character of their relationship, we agree with the learned judge that such relationship as aforesaid did not give rise to a fiduciary relationship. As correctly stated by learned counsel for the appellant the essence of fiduciary relationship is one C of trust and confidence between the fiduciary and the beneficiary where the latter undertakes or agrees to act for, on behalf or in the interest of, the beneficiary, being a person in a position of vulnerability. In the present case there is no element of trust and confidence in the relationship between the D parties, and no party is put in a position of vulnerability under the contract.

[27] It is true that there is a close relationship between the parties in the carrying out of their respective functions and obligations under the contract but it is not such giving rise to a fiduciary relationship. Their close E relationship can be attributed to the nature of the contract and their respective obligations thereunder. The terms of the contract stipulate that the appellant will provide labour force, manufacturing facilities and office space, while the respondents will provide the material required for the manufacture of loaders. The respondents also set out the manufacturing process, and F determine the technical and other specifications, to be complied by the appellant. It also appears to us that the other terms of the contract are substantially similar to other form of contracts for service with provisions on claims for late delivery, payment and calculation of fees payable. For the reasons aforesaid, we agree with the learned judge that the parties' G relationship is not based on trust and confidence. It is a mere principal-contractor relationship.

[28] We will pass on to the next issue as to whether the termination is H justified. Learned counsel for the appellant submitted that in view of the relationship between the parties there shall be an implied obligation of good faith and honesty and the duty to act reasonably. For the said reason it is argued that the contract could not be terminated by notice simpliciter.

I **[29]** It is observed that the termination clause as contained in Article X1 of the contract provides for three modes of termination. Firstly, by either party giving a written six months prior notice. Secondly, the contract will be terminated forthwith in the event either party ceases to carry on business, becomes insolvent, suffers the appointment of receiver and manager or

becomes subject to any proceedings under bankruptcy laws, etc. Thirdly, termination in the event of change of ownership of the appellant.

[30] In our view the existence of the said obligation or duty again depend on the expressed intention of the parties which is to be ascertained from the terms of the contract, and on the nature of the relationship between the parties. It is a well established principle that where the terms of a contract are clear and free from ambiguity the court will not impose any implied terms. In the present case the contract was terminated in accordance with the first mode aforesaid by giving the six months prior notice which in our view is reasonable. Further the contract also provide for the protection of the rights and obligations of the parties regarding delivery, warranty, payment and confidentiality for the duration of the six months' period. For these reasons we agree with the learned judge that the contract was validly terminated in accordance with the clear terms thereof.

[31] We would add that there is also justification in the termination of the contract. The appellant in its letter dated 4 November 1997 to the respondents admitted that it faced manpower problem to meet substantial volume increases apart from the problem with its contractor. Then there are the minutes of the meeting held on 8 November 1997 between the appellant's management and the representative of the respondents which showed that the appellant was facing manpower crisis coupled with shortage of trained staff and high turnover. These internal problems experienced by the appellant in our view constitute reasonable grounds for the respondents to terminate the contract by giving the requisite six months notice. Further, we are also in agreement with the learned counsel for the respondents that the appellant has in fact acquiesced in the termination when it asked the respondents to leave its premises before the expiry of the said six months period.

[32] We will next consider the issue on breach of confidence.

BREACH OF CONFIDENCE

[33] This issue centers on whether there was misuse of confidential information concerning a system devised by the appellant for the assembly of loaders (referred to as 'system of assembly'). It is the appellant's pleaded case that it has devised a unique system of assembly allowing it to achieve a high state of efficiency and state of control by the incorporation of several key features as particularised in para 8 of the statement of claim, including the use of specially designed assembly line with anti-static conveyor belt and anti-static immovable table, the installation of red and yellow calling lights to alert material shortage, the installation of red pilot lamp to highlight line

failure, the use of bowls and plates to hold the compact discs, the introduction of the use of stickers and the use of conveyor belts ('the key features').

[34] It is the appellant's case that such a system falls within the rubric of confidential information which the respondents have copied and used in their factory in breach of a duty of confidence. The learned judge in dismissing the appellant's claim referred to *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 which sets out the three elements to be established in order to succeed in an action for breach of confidence, that is to say, firstly, the information sought to be protected has the necessary quality of confidence; secondly, the information was communicated in circumstances importing an obligation of confidence; and, thirdly, there must be unauthorised use of that information to the detriment of the party communicating it. We are of the view that the learned judge has adopted the right approach in the determination of this issue.

[35] Having evaluated the evidence before him, the learned judge held as follows:

> Allan Netto was employed by Philips to be their man at Singamip. It has always been the arrangement that Philips would place their man at sub-contractors premises. This practice was accepted in the plaintiff's factories. SS Leong was placed in SS3 with the consent of the plaintiff. The unique system claimed by them was open to Philips who were at SS3 with the consent of the plaintiff. They can see the set up in the factory. I do not recall any evidence as being led or put that the unique system that Philips employee see every working day was confidential …

[36] The first question is whether the appellant can show that the information sought to be protected has 'the necessary quality of confidence'. On this issue, we agree with the learned judge that information on the system of assembly is not confidential in nature. As correctly pointed out by the learned judge the system of assembly was opened to the respondents' representatives who were at SS1, SS2 and SS3 with the consent of the appellant. It is also clear from the contract that the manufacturing process was regulated and monitored by the respondents to ensure quality control set by them. Under the contract the respondents were also given access to the appellant's factory to provide training opportunities for the appellant's personnel.

[37] We are also in agreement with learned counsel for the respondents that the appellant has failed to show that the system of assembly is unique when judged in the light of usage and practice of similar trade and industry. The

evidence clearly shows that the key features of the system as aforesaid have been used in the assembly industry long before the setting up of the appellant's assembly plant in SS1.

[38] For the reasons aforesaid, we unanimously dismissed this appeal with costs and make further order for the deposit to be paid to the respondents towards the account of taxed costs.

Appeal dismissed with costs.

Reported by Brendan Navin Siva